Hadayat stated in his second affidavit dated 6 September 1986 that this balance was satisfied when Ho entered into a transaction whereby Ho bought apartment No B-2, 1st Floor, Rebong Park, Johore Bahru at the price of $160,000. In his first affidavit dated 29 August 1986 Ho gave his version of this transaction as follows:

> A further sum of $100,000 being the balance repurchase price of $580,000 was to be paid on or before 17 March 1984 as indicated by the applicant's (Hadayat's) letter dated 27 January 1984. Subsequently and again at the proposal of the applicant through the said Choh Yet, the sum of $100,000 was to be secured by a sale to me of one unit of apartment known as B-2, 1st floor, Rebong Park, Johore Bahru by Kemajuan Beringin Sdn Bhd with a right of repurchase of the said unit of apartment by Kemajuan Beringin Sdn Bhd for which the said Choh Yet was also a director. However, Kemajuan Beringin Sdn Bhd was unable to repurchase the said unit of apartment neither was it able to secure a good title for the said unit of apartment.

A copy of the sale and purchase agreement dated 14 February 1984 relating to the apartment was produced to the Supreme Court (it was not produced in the High Court). It shows that Kemajuan Beringin Sdn Bhd agreed to sell the apartment to Ho at the price of $160,000. It was stated in the agreement that the price had been fully paid and that option was given to Kemajuan Beringin Sdn Bhd to repurchase the apartment at the same price, the option to expire on 30 April 1984. In our opinion, on the basis of the facts given by Ho and quoted above the legal position is as follows. As Kemajuan Beringin Sdn Bhd did not exercise its option to repurchase, the apartment remains to be the property of Ho, and the position of the $100,000 balance of the repurchase price due to Ho from Hadayat does not change, that is to say it formed a payment of the price of the apartment which Ho bought. The position is not affected by the breach of the sale and purchase agreement on the part of Kemajuan Beringin Sdn Bhd by its failure to secure a good title for the apartment. The breach was not committed by Hadayat but by a third party.

Under the above circumstances we find that Hadayat had paid Ho in full the repurchase price of $580,000 and therefore under the main agreement Ho does not have caveatable interest any more in the said land or in the subdivided lots thereof. In our judgment all the caveats should be removed except the caveats which had been entered against the following lots, ie HS(M) 818 PTD 4568, HS(M) 825 PTD 4575 and HS(M) 826 PTD 4575. Ho produced to the High Court three sale and purchase agreements, all dated 14 February 1985, by which Hadayat agreed to sell to Ho the three lots of land at the price of $90,000 respectively. It is stated in cl 7 of each of the agreements that the balance of $75,000 of the price is to be paid within five years from the date of the agreement and that Ho is at liberty to enter a caveat. Regarding these three lots, Hadayat's director stated in his second affidavit dated 6 September 1986 as follows:

> ... the respondent did lend $45,000 to the applicant, ie $15,000 each for each title ie HS(M) 818 PTD 4568, HS(M) 825 PTD 4575 and HS(M) 826 PTD 4576. As security for the said $45,000, the applicant did sign three purported sale and purchase agreements, each lot is valued at $90,000, leaving a balance of $225,000 unpaid. The purported sale and purchase agreements are in fact a loan transaction as can be seen in cl 7 of the agreement and the continuing guarantee attached to each agreement. Furthermore the agreements are not properly executed. They are not executed in the presence of solicitors. The respondent had also orally consented to the sale of the aforesaid three properties to third parties.

In fact in cl 7 there is no reference to any loan transaction. Moreover Hadayat is prevented by ss 91 and 92 of the Evidence Act from saying that the three agreements dated 14 February 1985 are not sale and purchase agreements but agreements for money loans. Hadayat did not allege fraud, intimidation or mistake so as to bring the agreements within the proviso to s 92. In our judgment Ho has acquired interests in the three lots by virtue of the sale and purchase agreements, which he has the right to protect by caveats.

We affirm the High Court's order for the removal of the caveats except the caveats in respect of the above three lots. We make no order as to costs. We order that the deposit should be refunded to the appellant.

Order accordingly.

Solicitors: *Abdul Raman Saad & Associates*; *HH Long & Co.*

Reported by *Prof Ahmad Ibrahim*

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 487 OF 1986
LEE HUN HOE CJ (BORNEO), WAN SULEIMAN AND WAN HAMZAH SCJJ
14 OCTOBER 1987 AND 25 NOVEMBER 1988

Civil Procedure – Appeal – Question of fact – Conflicting evidence – Documentary evidence – Whether appeal court entitled to differ on questions of fact from trial court – Allegation of fraud – Burden of proof

Evidence – Allegation of fraud – Necessity for proof beyond reasonable doubt – Presumption – Evidence Act 1950, s 114(g)

In this case the first respondent had alleged that he had been induced by false and fraudulent misrepresentations by the solicitor acting for and on behalf of the appellant to vacate a shop

where he was running a hair-dressing saloon and of which he was the lawful tenant of the appellant. His claim was for certain declarations and for damages including exemplary damages for fraud. The defence was a denial that any misrepresentation had been made and that the first respondent had vacated the premises voluntarily because business was poor. The learned trial judge gave judgment for the first respondent and the appellant appealed.

Held (Lee Hun Hoe CJ (Borneo) and Wan Hamzah SCJJ), allowing the appeal:

(1) In this case the learned trial judge had failed to consider the relevancy of contemporaneous documents and other contemporaneous items. In the circumstances the appeal court was free to differ from the trial court on questions of fact and act upon its own view of the conflicting evidence.

(2) The first respondent had in this case failed to prove his allegations and the court was satisfied that the solicitor did not make the promise to obtain any compensation for the first respondent in return for his peaceably quitting and delivering vacant possession of the premises as alleged by the first respondent.

(3) The onus of proof of fraud in Malaysia is proof beyond reasonable doubt.

Cases referred to

1 *Coghlan* v *Cumberland* [1898] 1 ChD 704 (refd)
2 *Bigsby* v *Dickinson* (1876) 4 ChD 24 (refd)
3 *Armagas Ltd* v *Mundogas SA*; *The 'Ocean Frost'* [1985] 1 Lloyd's Rep 1 (refd)
4 *Watt Or Thomas* v *Thomas* [1947] AC 484 (folld)
5 *Saminathan* v *Pappa* [1981] 1 MLJ 121 (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Civil Suit No 579 of 1985 (High Court, Penang)

Raja Abdul Aziz Addruse (*PR Maneksha* with him) for the appellant.

Sri Ram (*P Navaratnam* and *V Sithambaram* with him) for the first respondent.

Ranjit Singh for the second respondent.

Cur Adv Vult

Wan Hamzah SCJ (delivering the judgment of Lee Hun Hoe CJ (Borneo) and himself): The first respondent/plaintiff had alleged that he had been induced by false and fraudulent misrepresentations by Mr Mahesan, solicitor acting for and on behalf of the appellant, to vacate a shop where he was running a hair-dressing saloon and of which he was a lawful tenant of the appellant. His claim was for certain declarations and for damages including exemplary damages for fraud.

Briefly, the first respondent alleged that sometime in April 1984 the appellant had expressed an intention to obtain vacant possession of the premises earlier mentioned. The appellant then instructed Mr Mahesan to act on its behalf and, inter alia, to negotiate with the first respondent in order to obtain vacant possession. On 28 April 1984, Mr Mahesan allegedly made oral representation to the first respondent that the appellant would pay $170,000 to him if he would close down his business and deliver vacant possession on or before July 1984. Acting in belief of such representation by Mr Mahesan, the first respondent had on or about 30 July 1984 taken steps to close down his business at the premises, whilst retaining possession of the key to the main door.

The first respondent contended that the representation made by Mr Mahesan was made falsely and fraudulently and for the purpose of only causing him to close down his business and lock up the premises so that the appellant could unlawfully break into the premises and take unlawful possession thereof. In the alternative, the first respondent contended that the alleged oral representation made by Mr Mahesan constituted a collateral contract or warranty by the appellant operating as a condition precedent upon the strength of which the first respondent had acted to his detriment.

He therefore claimed that the refusal by the appellant to pay compensation for damages amounted to a breach of the term of the collateral contract or warranty, so that the condition precedent to his giving up vacant possession had failed. He also claimed for exemplary damages.

The substance of the defence was that the first respondent had vacated the premises voluntarily because business was poor. The appellant had stated in his defence that the first respondent was in arrears of rental in consequence of which he had received a notice to quit on 27 April 1984 and that his closing down of the premises was in compliance with such notice. The appellant also denied that it or its solicitors had promised the first respondent to pay $170,000 or any sum as compensation.

We agree with Raja Aziz that the main issue before the judge is:

(1) whether the alleged false and fraudulent misrepresentation has been made by the appellant's solicitor, Mahesan, and in that connection whether the first respondent was induced thereby to vacate the premises, and

(2) depending on this court's view of the representation, whether there had been a collateral contract or warranty.

Since the representation was oral the reasons for preferring the evidence of the first respondent to that of Mahesan, added Raja Aziz, was of great importance.

It is trite law that an appellate court would in appropriate cases act upon its own view of conflicting evidence (see *Coghlan* v *Cumberland*[1] and *Bigsby* v *Dickinson*[2]) and it was argued on behalf of the appellant that the judge had overlooked certain evidence which might otherwise have caused him to come to a different finding.

We would respectfully agree with the soundness of the observation made in *Armagas Ltd* v *Mundogas SA (The 'Ocean Frost')*[3] which reads:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of contemporaneous documents nevertheless holds true. The first of such contemporaneous documentary evidence is lawyer Rajasingam's letter. This letter is dated 8 August 1984, the date of the third meeting between Mahesan and the first respondent. The first respondent's affidavit shows that he had gone to complain about his treatment by Mahesan earlier that day. He claims to have told Rajasingam everything including the promise by Mahesan to get him paid $170,000, to take court action and to reply to the notice to quit. Yet Rajasingam's letter did not refer to anything other than the notice to quit. In addition there is the fact that the first respondent did not call Rajasingam, as one could expect him to do, to substantiate his allegations. The presumption under s 114(g) of the Evidence Act 1950 against the first respondent is something we would think is unavoidable in the circumstances, ie that Rajasingam, if called, would give evidence unfavourable to the first respondent. Our attention was drawn to the insistence of the first respondent under cross-examination that his instructions to Rajasingam had not been confined to the notice to quit but had included instructions to commence an action 'for the $170,000 which Mr Bala Mahesan had promised me'. It seems to us that the first respondent's reluctance to admit that he was aware all the time that Mr Rajasingam's letter to Mr Mahesan had been confined to the notice to quit would give rise to the inevitable conclusion that his instructions to Rajasingam had been confined to that issue only, and cast grave doubts on the truth of his other allegations. That the learned trial judge had failed to attach appropriate significance to the fact that Rajasingam had failed to deal with the more significant parts of the first respondent's alleged complaints against Mahesan is borne out by his brief and only reference to this incident in his grounds to the effect that the first respondent had consulted Rajasingam who gave a formal reply to Mahesan's notice to quit. One cannot avoid concluding that failure by Rajasingam to refer to the more serious undertaking by Mahesan to obtain a substantial sum in compensation was because there had been no such complaint from the first respondent, a complaint which he would unquestionably have made soon after what he described was a traumatic meeting with Mahesan.

The next contemporaneous item which the learned judge ignored, it was submitted, was the difference between what the first respondent alleged in his report to the police and his evidence-in-chief. Under cross-examination he admitted that most parts of the police report 'was incorrect'. In short most of the report was in contradiction to the salient points of his case. Of special interest is the fact that in the police report there was no mention that Mahesan had promised 'to get $170,000 from E & O' to pay him, or had assured him that E & O would pay him that sum. Instead, in the police report he said that he had been asked by Mahesan how much he wanted as compensation for leaving the barber's shop and he (the first respondent) had asked for $170,000. His demand in the report had by some process of wishful thinking become a promise to pay that sum by Mahesan.

Was Miss Shyama present at the first meeting between Mahesan and the first respondent? The learned trial judge dealt with this aspect of the evidence at some length in his grounds of judgment, rejecting her claim to have been present at the first meeting and accepting the first respondent's assertion that she was only present at the third and final meeting. His Lordship remarked that she was introduced into the scheme of things so as to corroborate Mahesan's evidence of the happenings at the crucial first meeting. There can be no doubt of the time that the first respondent's third visit was in the morning, about 10.20 am according to Mahesan's minutes, whereas the first visit was in the afternoon at about 4 pm. That Shyama was not back in her office until after 11.30 am on the date of the third meeting is borne out by irrefutable evidence, the Magistrate Court judgment of 8 August 1984, which corroborated her evidence that she was in the Butterworth court at 10.30 am. The third meeting could not have taken more than 30 minutes, certainly, not until 11.30 am. It probably was very brief indeed for even the first respondent's account was that he was practically shooed off. Raja Aziz indicated certain other bits of evidence which would tend to confirm Miss Shyama's testimony that this first meeting had taken place in her room. The first respondent said that he and Mahesan were seated on the same side of the table, which would have been indeed strange had they been in Mahesan's room. Mahesan gave evidence to the same effect, saying that he was seated with the first respondent on his left with Miss Shyama opposite them. It is significant that this account came out whilst the first respondent was under cross-examination. The damaging effect of this admission must have dawned upon him suddenly for shortly after he retracted his admission and claimed instead that he was seated opposite Mahesan.

We were also invited to draw appropriate inferences from the damage to the premises. Even the first respondent would not deny that the premises he had left behind was in a chaotic state with one broken washbasin and

damaged ceiling. The first respondent claimed that he had only been trying to remove things which he had originally installed. That the first respondent was not running a thriving business can hardly be disputed. Apart from Mr Hepworth's observation on his general lack of customers, even the first respondent admitted that his average monthly earnings was $400 a month. Then there is the undeniable fact that he was often in arrears of rent for which he received notices from time to time. Would the state in which he left the premises not tend to confirm that he had left in a state of considerable distress, under pressure from the appellant, rather than a willing departure with rosy expectations of receiving generous compensation which had been promised?

The correspondence between Mahesan and the appellant is further support for the version which the appellant has throughout contended is the true version, ie a demand for the $170,000 on 30 April 1984, his letter seeking instructions from the appellant and his prompt advice to take eviction proceedings. This exchange of letters would show that there was perhaps negotiations with the first respondent making the demands, but by no stretch of the imagination can it support his allegation of a promise to pay.

We were then referred to the comments made by the learned judge in his grounds of judgment to the effect that he found that the third meeting of 8 August 1984 was a follow-up upon the previous visit (ie the second meeting), where the first respondent wanted to know when he could get the compensation, and his utter surprise to be told for the first time that the sum demanded was unreasonable. Would the judge have come to the same conclusion had he given due regard to the first respondent's admission that he had been asked to see his own lawyer when he came to see Mahesan at the first meeting, but had chosen not to do so? Would this insistence by Mahesan not be more consistent with the appellant's case that they had just served a notice to quit on the first respondent and had no inclination to negotiate on compensation? We are inclined to agree that this is yet another factor which should incline us to the view that Mahesan's version is the true one.

It is clear from the grounds of judgment that the learned trial judge regarded the question of whether the first respondent was indeed in arrears of rent at the material time (for March and April 1984) of great importance out of which arose his opinion that the notice to quit (AB13) 'was just a device thought of by DW1 (the Assistant Manager) to get the plaintiff to agree to some form of compensation ...'. In his grounds of judgment he said, 'In fact, it was shown in evidence that the plaintiff was never in arrears of rental for March 1984.' That receipts were issued for rent is not in dispute. This explains the first respondent's anxiety to impress upon the court that his receipts had been kept in the shop, which was forcibly broken into (see his reply in cross-examination). However, the learned judge had failed to note the tenancy agreement the first respondent entered into with the appellant wherein rent was agreed to be payable *in advance*.

It would therefore appear to us that for the foregoing reasons, on the all-important issue of credibility we should apply the third of Lord Thankerton's principles as stated in *Watt Or Thomas* v *Thomas*[4] which we set out: 'III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.' Having taken the view of what happened at the meeting between Mahesan and the first respondent on 30 April 1984 (the first meeting) all we need say is that the first respondent had failed to prove his allegations and we would even go further and say that we are satisfied that Mahesan did not make the promise to obtain any compensation at all for the first respondent in return for his peaceably quitting and delivering vacant possession of the premises (as alleged in para 6 of the re-re-amended statement of claim, ie the so-called collateral warranty).

Bearing in mind that the onus of proof of fraud in Malaysia is proof beyond reasonable doubt (see *Saminathan* v *Pappa*[5]) we would therefore allow this appeal with costs here and in the High Court. The claim of the first respondent/plaintiff is dismissed. The High Court's order that the costs of the second defendant be paid by the first defendant is set aside and we order that the costs of the second defendant in the High Court be paid by the first respondent/plaintiff. The cross appeal is dismissed with costs.

Order accordingly.

Solicitors: *VP Nathan & Partners*; *Kumar Sitham & Co*; *Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*